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Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

JOSEPH THOMAS MULLOY,

Petitioner,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

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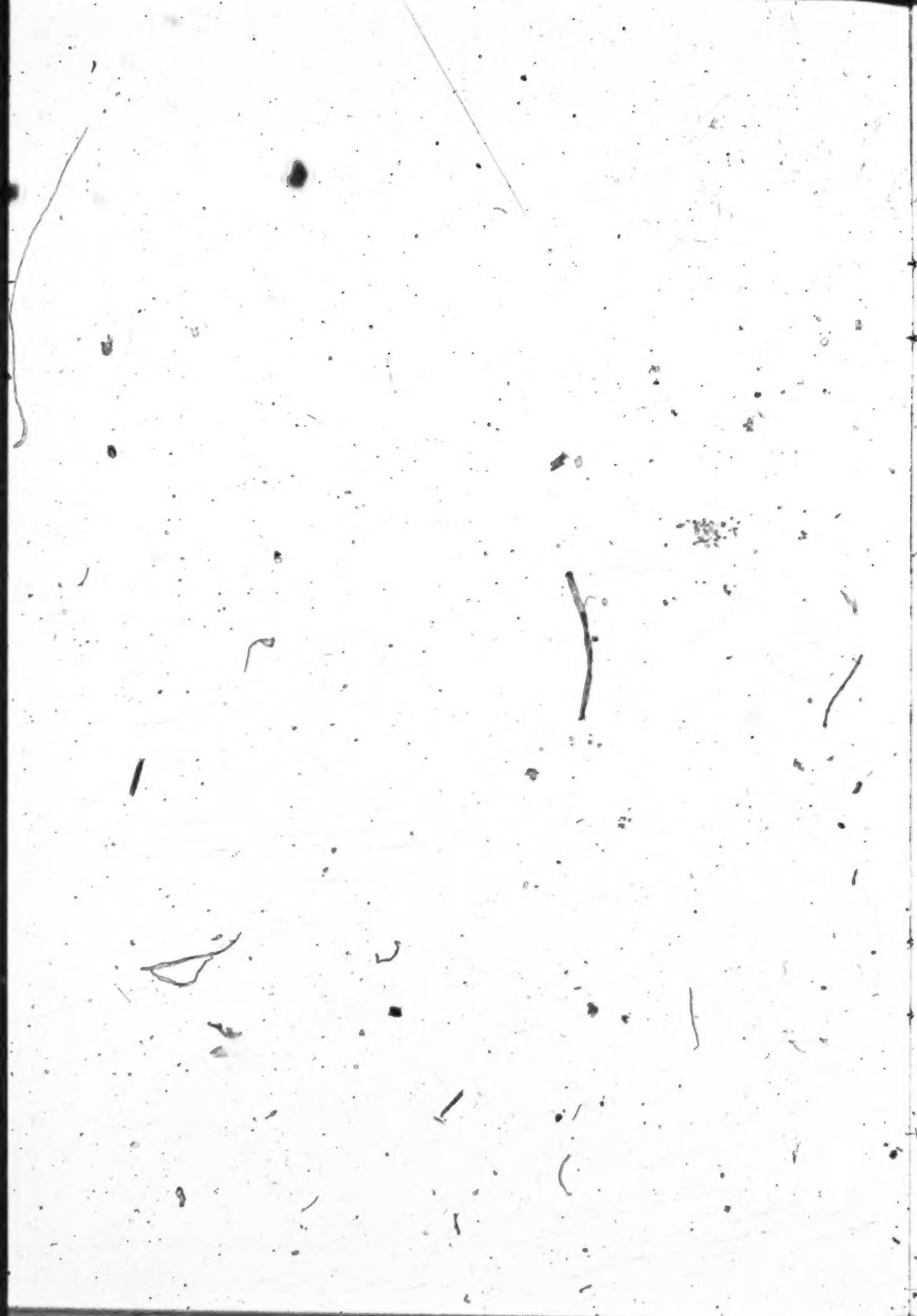

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ARGUMENT

I

The Local Board Improperly Refused to Reopen the Petitioner's Classification.

The petitioner has contended that in the circumstances of this case either the board was required to reopen his classification and consider his claim of conscientious objection on the merits or that, in fact, the board did reopen his classification, rejecting the claim on the merits, but denying the petitioner the

administrative appeal to which he was entitled under the regulations. In his brief petitioner argued that (l) he made out a prima facie case for classification as a conscientious objector and that (2) the board engaged in evaluative consideration of the claim on the merits under the guise of determining that the petitioner did not make out a prima facie case. (Brief for Petitioner, pp. 12-22). The government now concedes that "the new information he presented in the representations contained in the Form 150 and in the accompanying letters did constitute a prima facie showing that he met the statutory standard for C.O. status.", (Brief for United States, pp.28-29).This departure from the government's original position, which was that the petitioner had not made out a prima facie case, (Civ. Tr. 13), will serve to narrow the issues somewhat. The government also appears to concede that the board engaged in evaluative consideration of the claim on the merits. Its position is that the board is not required to reopen even where the new facts alleged would, if true, justify a change of classification, and that in such circumstances evaluative consideration does not constitute a reopening in fact. (Brief for United States, pp. 26-36). By so arguing, it must implicitly concede that if no such authority exists, the board was required to reopen the petitioner's classification in the case at bar or that it reopened the classification in fact. Either way the induction order would be void and the conviction of the petitioner would have to be reversed. *United States v. Freeman*, 388 F.2d 246 (7th Cir., 1967); *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967).

The crucial question then is whether the board was justified in refusing to reopen the petitioner's classification despite the presentment of a prima facie case of conscientious objection. The government argues that the board was not required to reopen here because (1) a board has "discretion" to refuse to reopen despite the presentment of a prima facie case, (Brief for

United States, pp. 29-30), and (2) that discretion is properly exercised where the board has compelling reasons for questioning the veracity or sincerity of the allegations. (Brief for United States, p. 35). It is the submission of the petitioner that there is no discretion to refuse to reopen where a prima facie case for classification as a conscientious objector has been made, and that, even assuming such discretion, in the case at bar the board did not in fact question the petitioner's veracity or sincerity, and had no compelling reason for so doing.

A. Where a Request for Classification as a Conscientious Objector Has Been Made for the First Time, and the Information Submitted in Support of the Request, If True, Would Entitle the Registrant to Such Status, the Board Must Reopen the Classification.

Heretofore, all courts but the Sixth Circuit have assumed that whenever a prima facie case for *any* classification has been made out, the board must reopen. As stated in a recent District Court case, *Radel v. Commanding Officer*, ___ F. Supp. ___, (E.D. Pa. 1969), 2 SSLR 3430, "It is well settled that a Local Board must reopen upon request if the registrant has presented a prima facie case for the classification claimed." The argument that the board has discretion to refuse to reopen if it decides that a registrant claiming conscientious objector status is not sincere was expressly rejected in *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967). There the board found that the registrant had previously applied for enlistment in a reserve program, for which he had not been accepted, and as a result was of the opinion that the registrant "was seeking to avoid induction." According to the Court, the board decided that, "regardless of the prima facie sufficiency of the information submitted, it was not, when probatively weighed against other elements in the situation entitled to credence in fact." 388 F.2d at 976. It was the view of the Ninth Circuit there was no discretion to refuse

to reopen upon the presentment of a prima facie case and, that, therefore, the board necessarily had engaged in evaluative consideration.

The government does not try to reconcile the decision of the Sixth Circuit in the case at bar with the decision of the Ninth Circuit in *Miller*, although it claims that the other cases cited by the petitioner are reconcilable on the ground that in those cases the board had no reason to question the veracity or sincerity of the registrant. Nor does it try to reconcile the decision in the case at bar with that of the Eighth Circuit in *Davis v. United States*, 410 F.2d 89 (8th Cir., 1969), holding that, "Where the statements, if accepted at face value, constitute a prima facie case for the conscientious objector classification, the board is required to reopen the classification." 410 F.2d at 94-5. The government can cite no case where a Court of Appeals has sanctioned the interpretation that the government is putting upon the board's power to refuse to reopen a classification despite the presentment of a prima facie case. The government should bear a heavy burden in persuading this Court that its interpretation of the regulations is the proper one.

The only textual support in the regulations that the government can find for its argument is that 32 C.F.R. Section 1625.2 says that a board *may* reopen the classification in the circumstances defined. It also points to the use of the word *shall* in Section 1625.3 and *shall* not in Section 1625.4. As pointed out in the petitioner's main brief, pp. 16-17, any implied discretion in the word "may," would relate to the situation where the registrant had failed to reasonably inform the board of the new facts. More significantly, however, important procedural rights should not be made to depend on "may-shall" distinctions. "It is well established that the word 'may' can be at times construed to mean 'shall,' just as the word 'shall' may be construed to mean 'may.' The interpretation of

those words depends upon the context in which they are used and the intention of the legislative body as is shown by the statute and as may be gleaned from committee reports and similar authoritative sources." *Kraft v. Board of Education*, 247 F.Supp. 21, 24 (D.D.C. 1965). This is particularly so when dealing with procedural requirements. "It is generally recognized that whether procedural requirements . . . are mandatory cannot be determined by merely examining the form of the statute involved, *i.e.*, by a mere literal reading of the law but 'can only be determined by ascertaining the legislative intent.' If a requirement is so essential a part of the plan that the legislative intent would be frustrated by a non-compliance, then it is mandatory." *United States v. Regis Paper Co.*, 355 F.2d 688, 692 (2d Cir., 1966). As pointed out in the main brief, pp. 15-16, the very nature of classification under the present Selective Service Act presupposes that changes will occur with some frequency. There are certain situations where the power of the board to reopen is specifically restricted. But where no restriction is imposed on that power, the clear import of the regulatory scheme is that the classification is to be reopened whenever a prima facie case has been presented. In this sense the use of "may" becomes mandatory.

All a reopening means is that the claim will be considered on the merits and that the registrant has the right to a personal appearance and an appeal. It is not possible for a registrant to "delay his induction by successive requests and appeals." The board may refuse to reopen on the ground that the facts giving rise to the claimed classification existed at the time of the original classification and were not brought to the board's attention then. 32 C.F.R. Section 1625.1 (b); *Keene v. United States*, 266 F.2d 378 (10th Cir., 1959). Likewise the facts may not, as a matter of law, be sufficient to make out a prima facie case. See *United States v. Hamsuk*, 419 F.2d 929 (7th Cir.,

1970); *Robertson v. United States*, 417 F.2d 440 (5th Cir., 1969). Moreover, where the registrant is not seeking a new classification, but is submitting new evidence in support of a classification that has previously been denied, the burden of establishing a case of prima facie entitlement is correspondingly greater. *Cf. Woo v. United States*, 350 F.2d 922 (9th Cir., 1965). And whether a classification must be reopened prior to the issuance of an induction order has nothing to do with the question of what constitutes "circumstances beyond a registrant's control," requiring a reopening after an order for induction has been issued. Indeed, the limitation on the board's power to reopen after an induction order has been issued makes it all the more imperative that the board reopen upon presentment of a prima facie case prior to the issuance of an induction order.

The government next raises the spectre that if the board has no discretion to refuse to reopen, the operation of the Selective Service System may be frustrated and implicitly that the United States will be unable to field an army. This contention is scarcely credible at a time when despite the fact that more registrants are deferred or exempt than are classified as available for service, so many are classified as available that a lottery system of selection for induction has become necessary. Nor is it now possible for a registrant to escape induction due to delays in processing. Any registrant in Class 1-A or 1-A-O whose random sequence number is reached, and who would have been ordered to report for induction except for delays due to a pending personal appearance, appeal, preinduction examination, reclassification, or otherwise, is ordered for induction even if the year in which he otherwise would have been ordered to report has ended and even if he has attained his twenty-sixth birthday. 32 C.F.R. Section 1631.7(a). The present petitioner was twenty-three at the time he applied for reclassification and

there was no danger that he would avoid induction due to age even if his classification had been reopened.

The reason why a reopening is mandated upon the presentment of a prima facie case goes to the essence of due process. The concept of due process is centered largely around standards designed to assure opportunity for full presentation of evidence so that the truth may be established as accurately as possible. This is embodied in the scheme established by the Selective Service regulations. Only by a personal appearance can it be assured that the registrant will have the opportunity to fully present his evidence to the board. In the case of a registrant claiming conscientious objector status, it is only by such an appearance that he can explain the nature of his beliefs and try to convince the board of his sincerity. The "courtesy interview," to which the government refers, would presumably be discretionary under the government's view, since 32 C.F.R. Section 1625.1(c) reads, "Registrants *may* be questioned." Therefore, the board would be able to refuse to reopen the classification without ever having seen the registrant or having heard him state his views.

Moreover, the regulations also provide for an administrative appeal in the case of reopening. 32 C.F.R. Section 1625.13. The regulatory scheme envisions the appeal board making the same kind of merits determination as the local board. If the local board determines the question unilaterally and refuses to reopen, the appeal is denied. No matter what doubts the local board may have about sincerity or veracity or no matter what its investigation may show, under the regulations, the appeal board is to review its determination. To allow the board to determine disputed facts or state of mind unilaterally and to then refuse to reopen the classification is completely inconsistent with the purpose of Section 1625.13, which authorizes an appeal following a reopening.

The government finally contends that to allow the board to refuse to reopen despite the presentment of a prima facie case would not obliterate the distinction between a refusal to reopen and a denial of a requested classification after reopening. Whether it would or would not have this effect, *it would completely eliminate the role of the courts in reviewing refusals to reopen.* All the board would have to say is that, "We exercised our discretion, considered the facts and found a reopening not justified because the facts supporting the claimed classification simply were not true." Whenever the facts are in dispute, as will frequently be the case, the court could not find that the board "abused its discretion."

In the case of a claim for conscientious objector status the board could always find that the registrant was not sincere and, therefore, "appropriately discount the written representations accompanying the request." (Brief for United States, p. 39). If it granted a "courtesy interview," as in the case at bar, its action would be completely non-reviewable, because then it would be relying on the "substantially contemporaneous statements made at the interview." What stands out most clearly in the case at bar is that there is nothing more the board could have done and no further information it could have considered if it had in fact reopened the classification. To accept the government's position is to allow the board to characterize its own action as a refusal to reopen or a reopening in fact, depending on whether it wants to permit the registrant to appeal, and to effectively insulate its action from judicial scrutiny. The grant of such free-wheeling power to draft boards is neither sanctioned by the regulations nor consistent with due process of law.

The present petitioner presented a claim for classification as a conscientious objector, probably the most difficult classification for a board to determine. Such a determination requires not only the verification of facts, but the evaluation of

sincerity. The petitioner had presented this claim to the board for the first time and, as the government concedes, he made out a prima facie case of entitlement. To allow the board to dispose of this claim summarily, to allow it to decide that the petitioner was not sincere and to foreclose review of the determination by an appeal board, is nowhere authorized by the regulations. To read such power into the regulations upsets the orderly procedure that is provided for reclassification, deprives registrants of the opportunity to appeal a determination on the merits by the local board, and effectively eliminates judicial review of a board's refusal to reopen. No valid reason has been advanced for so doing.

B. The Board In Fact Did Not Question Petitioner's Veracity or Sincerity and Had No Compelling Reason To Do So.

Even if the Court were to accept the government's argument that the board has discretion to refuse to reopen where it questions the registrant's veracity and sincerity, the board would not have had such discretion in the case at bar. The government has gone through the file and indicated matters that, in its view, *could* have caused the board to question the petitioner's sincerity and veracity. Although it is submitted that these matters would not constitute a "compelling reason" to question veracity or sincerity, the more important question is what *did the board in fact do.* The government's argument proceeds solely on inference, what it thinks the board could have done rather than what the board did in fact. It attempts to discount the statements of the board members that they "assumed the petitioner was sincere," saying that this only meant that he was sincere in his remarks about the importance of his work in Appalachia. (Brief for the United States, p. 43). It also says that the assumption that members Sherman and Wolking (who at all times purported to speak for the entire board) meant to say that they regarded the petitioner as sincere

in his claim to being a conscientious objector, is not reconcilable with their testimony viewed as a whole. Finally, it argues that, "If they assumed petitioner was sincere in that representation, it would have been entirely inconsistent, and indeed, inexplicable, for them to have voted not to reopen." (Brief for United States, p. 43). As to the latter point, petitioner has suggested that the failure to reopen was indeed inexplicable, which is why his conviction should be reversed. But if a reason need be found, it may lie in the fact that the board members did not read the petitioner's file, particularly his Form 150, with any degree of care, and lacked a minimum understanding of the applicable statute and regulations to pass intelligently on his claim.

Leaving that aside, if the reason for the board's refusal to reopen was that they found that the petitioner was not sincere in his beliefs and therefore, discounted the statements in his Form 150 and the supporting letters, *is it not strange that no board member ever said so and that there is no indication in the file that this was the board's reason for its action?* The government has not pointed to one place in the record where any board member *affirmatively* stated that he disbelieved the truth of the petitioner's representations or disbelieved his sincerity. The board's position, as recorded in the file, was that, "The information in the file did not warrant reopening of 1-A classification." (A. 14, 70). If the reason was that "registrant was not sincere in his beliefs," why, may it be asked, was this not recorded in the file? Board Member Wolking, who said that he read the Form 150 stated that *after reading the form*, his conclusion was that this did not entitle the petitioner to a reopening of his classification. (A. 82). Mr. Huddleston, the government's attorney, kept trying to bring out the fact that the board members assumed that the petitioner was sincere. (A. 84); (Civ. Tr. 60, 61). If the government is going to base its

argument on the fact that the board found the petitioner was not sincere, if should be able to point to some evidence in the record that *affirmatively* supports its conclusion. This is all the more so, since the action of the board must be supported on the grounds that the board gave for such action. *Gatchell v. United States,* 378 F.2d 287 (9th Cir., 1967). And in conscientious objection cases a determination of insincerity must be supported by some factual finding. *Witmer v. United States,* 348 U.S. 375 (1955); *United States v. Martin,* 416 F.2d 44 (10th Cir., 1969). The reason the board gave for refusing to reopen was that the petitioner failed to make out a prima facie case, not that, although he did make out a prima facie case, the board had reason to believe he was not sincere, and finding that he was not, refused to reopen.

In any event, the board had no reason to question the truth of the petitioner's allegations relating to his religious belief, which were supported by a letter from a Catholic priest. (A. 49). He filed his claim as soon as it matured, and as he explained, his experiences in Eastern Kentucky, including the sedition prosecution to which he was subject, were the catalyst, causing his generalized belief in pacifism and non-violence to crystallize into opposition to participation in war. (A. 21-22, 41-42). He could not have filed earlier because the requisite belief did not exist. Also, the claim was made almost two months after his request for an occupational deferment had been denied. The chronology of events, therefore, would not justify the conclusion that he was insincere. *United States v. Martin, supra.* In any event, the time when the petitioner filed his claim did not, in fact, appear to be of concern to the board, for Board Chairman Sherman testified that he did not recall any questions being asked about why the petitioner did not file for conscientious objector status earlier. (A. 68).

Petitioner's repeated references to his work in Appalachia, far

from being inconsistent with his claim of conscientious objection, were, in his view, the strongest evidence he could produce in support of it. If the board members had read his Form 150 and the supporting letters with any degree of care, they would have understood that. And he was entitled to assume that anti-poverty work would qualify as appropriate civilian work if he were classified as a conscientious objector. 32 C.F.R. Section 1660.1. The "tone" of the letter of November 14 would seem to further attest to his sincerity, but, in any event, that letter is not particularly relevant, since, as the government elsewhere points out, the decision not to reopen was made immediately after the interview on November 9. (Brief for United States, p. 42). It is submitted that, considering all the information in the file, any conclusion that the petitioner was not a conscientious objector would have been "solely on the basis of suspicion and speculation." *Dickinson v. United States*, 346 U.S. 389 (1953). At least, it is clear that, based on the information in the file and what was said at the "courtesy interview," the board had "no compelling reason to question the petitioner's sincerity."

The board did not in fact question the petitioner's sincerity. It decided that he did not make out a prima facie case for classification as a conscientious objector. That conclusion *is* inexplicable except for the fact that the board members did not carefully read the file and did not understand what a conscientious objector was. The very facts of this case demonstrate the dangers inherent in allowing the board to refuse to reopen when a prima facie case has been presented.

This should demonstrate most cogently the unsoundness of the proposition for which the government is contending.[1]

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1. It should also be noted that only after a prima facie case has been presented, would it be relevant to consider the question of sincerity since the nature of a registrant's prima facie case determines the type of evidence needed to rebut his claim. *Witmer v. United States*, 348 U.S. 375, 382 (1955).

II

The Petitioner's Claim for Classification as a Conscientious Objector Was Not Given Full and Fair Consideration by His Local Board.

In this portion of its brief the government says that the pertinent decision on petitioner's classification was not made until the January meeting. (Brief for United States, p. 47). However, earlier it states that, "Following the courtesy interview [in November] the three members present discussed the case briefly and came to the unanimous conclusion that there was no basis or justification for reopening the classification." (Brief for United States, p. 42). As Board Chairman Sherman testified, the matter was not formally decided until the January meeting since until that time it was believed that the petitioner was under indictment, but at the January meeting, "We were free to go ahead and act on the file and we would readopt or reaffirm or reiterate our action of November the 9th." (Civ. Tr. 49). It is clear that the crucial decision not to reopen was made on November 9. The date the decision was made becomes significant in view of the government's argument that Board member Downes, who admittedly only "scanned" the file prior to the November 9 "courtesy hearing," said that he read the Form 150 prior to the January meeting. (Brief for United States, p. 46-7). Board member Rickert, who was not present at the November meeting, also said he read the file prior to the January meeting, but, as pointed out previously, by that time the effective decision had been made.

The decision, therefore, was made by members Downes, Wolking and Sherman, and it was made at the November meeting. Mr. Downes testified that he only "scanned the file, because he was the newest member of the board and was not familiar with what was in the file at all." (A. 74). He did not

recall reading the Form 150 at that time, (A. 74), and stated that he based his decision on "the basis of what was discussed, what we were able to glean from his own statements.' (A. 81). Mr. Wolking testified that he would have read what was in the file, including the Form 150, although he did not specifically recall having gone through it or how much time he spent on it. (A. 84). Chairman Sherman stated that, "The board members looked over his file before he came in as we do anybody else." (A. 91). This was the extent of the consideration that was given to the file prior to the decision.

The "courtesy hearing" was held on the afternoon of November 9, and there were several registrants ahead of the petitioner who also met with the board. (Civ. Tr. 154). According to Mr. Downes, the clerk told the board members that the petitioner was waiting, and "all of the board members, I believe, or those who cared to look at the file," could do so. (A. 77). The "normal procedure" then was to look at the file only before the registrant came into the interview. *There simply would not have been time for each of the three board members to read the file, particularly the detailed answers to Form 150, even if they had wanted to do so.* Mr. Wolking's statement that he "read" the file must be viewed in this context, and it is understandable that he did not remember how much time he spent on it. Mr. Downes did not even make a pretense of having read it, and Chairman Sherman said merely that the members "looked it over." According to the government, the three members then discussed the case "briefly" and came to the unanimous conclusion that "there was no basis or justification for reopening the classification." (Brief for United States, p. 42).

This is the kind of consideration that the petitioner's claim for classification as a conscientious objector received, and it is on this basis that he must serve five years in prison. The

government says that the board members must have found that the petitioner was not sincere, because if they assumed that the petitioner was sincere in his representations, "It would have been entirely inconsistent, and indeed, inexplicable, for them to have voted not to reopen." The above suggests that there may have been another reason—*that they never really read his file.* Surely, this cannot be due process of law.

The government also argues that the members of the board were not shown to be incompetent. At the same time it argues that petitioner's counsel was permitted to go too far in examining them as to their competency (Brief for United States, p. 51). In point of fact, petitioner's counsel was severely restricted in his efforts to show that the board members lacked a minimum understanding of the applicable statute and regulations. (A. 78). But enough has come through to make it clear that the members were very deficient in their understanding. It *was* significant that the Chairman, the only lawyer on the board, thought that one who would kill in self-defense could not be classified as a conscientious objector, since the petitioner had been charged with flourishing a deadly weapon. (A. 38). It is inaccurate, therefore, to say that the variance between the chairman's definition and the statutory one was not in issue. (Brief for United States, p. 49). More significantly, the testimony of all the members, taken together, it is submitted, demonstrates little or no understanding of the applicable law. This made it impossible for them to pass intelligently on petitioner's claim.

The matter of reading the file and understanding the applicable law is of crucial importance, not only in the case at bar, but in all cases of selective service classification. The actions of the draft board, despite their impact on the lives of young men, are not subject to judicial review in the same manner as the actions of other administrative agencies. Judicial

review of a registrant's classification has been described as the "narrowest known to the law." *Blalock v. United States*, 247 F.2d 615, 619 (4th Cir., 1957). The classification may be set aside only if it is without "basis in fact," and the courts may not look for "substantial evidence" to support it. *Witmer v. United States*, 348 U.S. 375, 381 (1955). A local board may know nothing of the applicable law and may not even read the file. If the registrant refuses induction, the file is turned over to the United States Attorney. He, being an expert on the law and familiar with judicial decisions interpreting it, can comb the file and can come up with a fact here, an inconsistent statement there, that will provide a basis in fact for the board's determination, particularly with respect to something as subjective as "sincerity." This is the reality of the situation in all too many cases, and it is amply demonstrated in the case at bar.

If registrants are to receive a modicum of administrative due process from local boards, the board members must be required to carefully read and consider the file, particularly where the registrant claims a status such as conscientious objector. As a defense to a criminal prosecution the registrant should be able to show that his claim was not fully considered and that the board members did not carefully review his file. He should also be able to show that they lacked a minimum understanding of the applicable statute and regulations that they are called upon to administer. Only in this way can registrants be assured of due process of law, which, it is submitted, was denied to the present petitioner.

CONCLUSION

For the reasons stated herein and in the Brief for Petitioner, it is respectfully submitted that the judgment of the Court below should be reversed and the conviction of the petitioner be set aside.

Respectfully submitted,

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